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DICTA

Vol. VII JANUARY, 1930 No. 3

THE WORLD COURT AND A WORLD OPPORTUNITY

By Wayne C. Williams of the Denver Bar

NO American can contemplate the World Court in its beginnings without thinking of the beginnings of our own Supreme Court in the early days of the republic.

Many analogies have been drawn between the two courts, just as many have been successfully drawn between the beginnings of the Federal union of states and the early years of the League of Nations.

While the historical and constitutional analogies, present fascinating studies the one to be drawn here is largely personal.

Is there a John Marshall on the bench of the World Court? Is a Marshall needed there and is the opportunity presented by that court, its origin, purposes and powers, sufficient to cause us to expect that such a man will emerge to mould the decrees of that Court into a new world order wherein all nations will come to a common forum for the judicial settlement of their disputes?

John Jay declined the Chief Justiceship of the United States Supreme Court saying, "I left the bench perfectly convinced that under a system so defective, it would not obtain the energy, weight and dignity, which is so essential to its affording due support to the National government, nor acquire public confidence and respect."

The task from which Jay shrank, apealed to John Marshall.

No weakling could have given permanent force to the decisions of the Supreme Court in *Marbury vs Madison* or *McCullough vs Maryland.* No inferior personality could ever have persuaded his colleagues on the Bench to arrive at

these monumental decisions. It was Marshall's personality and gifts that made his great work possible.

It is a mistake to think of Marshall as forcing any opinions on his colleagues for while he had a dominating personality and a disposition not easily swayed yet he united to these firm qualities a modesty, a deference to the views of others, a tender heart and a most convivial nature—all graced by a pleasing manner that charmed his bitterest opponents. There was no undue or frosty dignity about Marshall and precisely these qualities, noted by so many of his contemporaries, will be valuable equipment for any judge on any bench who must match minds with colleagues.

Given then a great mind, a peculiar union of dominating but pleasing personality, and given also a great opportunity, we shall find history being made, as Marshall made it, and we are quite prepared to believe Mr. Justice Story when he said—

> "When may we again hope to see so much moderation with so much firmness; so much sagacity with so much modesty; so much learning with so much piety; so much wisdom with gentleness."

Let us glance at the superb constitutional structure erected by the Marshall decisions:—

1. Supremacy of the Federal government, its constitution and laws. Emphasized in *Fletcher v Peck,* (6 Cranch 87), and in *McCullough vs. Maryland* (4 Wheaton 316).

2. Power of Federal Supreme Court to interpret the constitution and laws of the United States and to declare a law unconstitutional. (*Marbury vs. Madison,* 1 Cranch 137).

3. State legislatures may not annul judgments of the United States Courts. (*Fletcher vs. Peck,* 6 Cranch 87).

4. States may not tax instrumentalities of the Federal government. (*McCullough vs. Maryland*).

5. The Federal government possesses inherent power to function as a sovereign government and to do all things reasonable and necessary to function as such. (*McCullough vs. Maryland.*)

6. The inviolability of all contracts. ("Dartmouth College case", 4 Wheaton 518).

7. Power of the Supreme Court of the nation to pass upon final judgments of state courts as to rights of all citizens under Federal laws and the constitution. (*Cohen vs Virginia,* 6 Wheaton 264; a case that raised and decided fundamental principles and formed the whole distinction between state and national legislatures and relative areas of power.)

8. The supreme power of the Federal government over interstate commerce. (*Gibbons vs Ogden,* 9 Wheaton 1).

There are other great decisions but these are enough. They clothed the nation with power and dignity and authority; they firmly established the nation's supremacy in its constitutional field and forever established the dignity and power of the great court from which the decisions came.

The World Court faces a situation not unlike that which faced Marshall on the American Supreme Bench. It is not moulding a new world state and does not seek to and this fact must ever be kept in mind as its decisions draw the nations into closer and yet closer cooperation.

But only states can be parties before it and only international questions and rights arising out of international conventions, treaties and compacts, can be construed or enforced by its decisions. It has separate nations, each sovereign in its own right, to reconcile and never were nationalistic sentiments or rights more strongly insisted upon than today. It is new and its real powers are comparatively untried. It faces hostility in many quarters of the world and in many nations (not excepting our own) it faces the bitter opposition of certain eminent statesmen.

Sound reason was conspicuously a part of Marshall's equipment and of his triumphs, and sound reason (always good common sense juridically declared) will make the World Court respected and adhered to.

The World Court does not directly touch the citizen, the national, in his individual rights and capacities except as he is an integral part of a greater whole—his nation.

The Court has yet to come into the consciousness of the average national; yet to make its way with him and appeal to his sense of justice and progress. But that is all coming.

Created on December 16th, 1920, under Article Fourteen

of the League of Nations Covenant, the Court began with these broad jurisdictional grants:—

"The Court shall be competent to hear and determine any dispute of an international character which the parties thereto submit to it."

The court may also give advisory opinions upon any dispute or question referred to it by the Council or Assembly of the League.

The World Court has jurisdiction of all cases submitted to it by states, all cases under treaties or conventions, and a wide jurisdiction under a special jurisdictional clause for all nations accepting such jurisdiction and covering interpretation of treaties, questions of international law, existence of any fact which constitutes a breach of international law and the nature or extent of reparation to be made for any such breach, and the interpretation of any court judgment.

In adjudicating and deciding matters before it the Court may avail itself of, and apply international conventions and established usages of member states, international custom, general principles of law recognized by all nations, and judicial decisions and teaching of publicists.

Here is scope and power sufficient to mould the thoughts, purposes and habits of the peoples of the world to a new international order. The breadth of it takes away the breath and would be stimulating to any jurist, even without the vision of a Marshall.

Let us take one single instance of interpretation that may arise:—the preamble of the League covenant recites among other things that it is formed to

"promote international cooperation and to achieve international peace and security, by the acceptance of obligations not to resort to war."

The Kellogg Peace Treaty provides that—

Art. 1. "The high contracting powers solemnly declare . . . that they condemn recourse to war and renounce it respectively as an instrument of their national policy towards each other."

Here are two declarations renouncing war that must be read together and that bring even America into the sweep of the World movement for peace through a World Court, en-

forcing and giving effect to the preamble of the League of Nations.

Some Judge will be found who has courage and vision and those powers of profound logic which will enable him to chart the course of the nations, as he reads the charter of the League and Court and applies them to some concrete case before him.

We must not forget that Marshall was helped by other unifying forces making for national cohesion and a stronger central government, but he had neither the railroad nor telegraph and none of those marvelous mechanical inventions that have bound America into a unit.

The World Court starts with a physical and material equipment between the nations that is far more effective in moulding the peoples of the world together and clarifying misunderstanding than had Marshall in his day.

The decisions of the Court can be known throughout the civilized world in twenty-four hours after they are rendered. The airplane and radio have obliterated international boundary lines and the voice of the Court itself could be heard beyond the seas. There is, too, a new sense of international unity in the world that scarcely existed among the states when Marshall began his great career. There is a growing demand for peace among all peoples and to that deepest impulse of mankind the Court can, in future decisions, give form and force and effect.

Why may we not look with confidence to the World Court to forge the new links in the chain of brotherhood between peoples of the earth?

Perhaps the statesman, the soldier and executive (with all their commendable activity), may not solve this problem. Why may we not expect a Court with its calm atmosphere, its careful judicial process, its wise judgments, without heat or haste, not based on the whims and caprices of the moment or the wild notions of the mob-mind but sustained by judicially ascertained facts and ennobled by the highest reason and the real hopes of mankind, to interpret the conflicting rights of the nations so justly that even the hostile and defeated state will accept the judgment; to keep all nations in their proper

sphere and avoid all forces that seek to erect or maintain a super state, by adjusting in delicate balance, the centripetal and centrifugal forces that are operating in the world today; to give small and weak states a forum into which they may come with confidence and safety; to soundly interpret the great charter of the League and Court and the solemn covenants of the nations to renounce war.

Here are tasks for many a Marshall.

Upon its decisions will rest the success not only of the Court itself but the validity and value of the covenants that have arisen since the world war.

When the nations and the peoples of the world are once convinced that they have a forum that is more than a forum—a Court—deciding with impartiality, with sound reasoning and breathing a spirit of judicial integrity, then they will feel about the World Court as Americans came to feel about the court presided over by John Marshall.

This will then be a world of law—orderly, united; and the process of civilization will have advanced a far step.

NOTE: At the request of various members of the Association, President John H. Denison has appointed a committee to investigate the question of adhesion by the United States to the World Court, which matter comes up soon before the United States Senate for action. The committee consists of L. Ward Bannister, Chairman, Will Shafroth, J. H. Pershing, George F. Dunklee and Roger H. Wolcott. At the next meeting, Monday, January 13, Mr. Bannister will present the report of the committee, which should be of keen interest to all members of the Association.

PROMOTERS' CONTRACTS

By Frank J. Mannix of the Denver Bar

THE development of systems of supervision and investigation as to the promotion of corporations, with a view towards weeding out the unsound or the fraudulent, may, to some extent, have tended to render the promoters of corporations more conservative. The millennium, however, is far from being at hand, and the day of the Western Surety Company and kindred promotions is not yet a thing of the past. So long as there are persons of ability who are unprincipled in their methods and unduly technical in their maneuvers, questions as to a corporation's rights and liabilities arising under a contract made with its promoters, or by them with others, will continue to appear. It is to such questions that this paper will be briefly addressed.

The first question to be considered is as to what is a promoter. Generally he is one who alone or with others takes it upon himself to organize a corporation; to procure the necessary execution of the articles of incorporation, to file the articles with the proper officers and see that a certificate of incorporation is issued for the company. Ordinarily his work terminates when the company has been organized and the directors have taken over its affairs. It is a question of fact and not of law as to when the promoter commences operations as such, and when he ceases to be such. While he acts as a promoter he occupies a fiduciary relationship towards the corporation and also towards the subscribers to the company's stock. It is important, therefore, to determine just when he commences to be a promoter and just when he ceases to be such. Quite frequently he may, after the organization of the company, retain his character as a promoter, by dominating the policies of the company, without being an officer or director thereof. In such cases he retains his rights and obligations as a promoter.

In all cases where a corporation can be shown to have become a party to a contract, made by or with its promoters, the following circumstances must be shown by the pleading and established by the evidence:

1. The parties to the contract must have mutually expected that a certain corporation was to be organized.

2. That the contract shows that it was to be with the company that was expected to be organized.

3. That the organization would be such that the contract was one of such a character as to be proper for the corporation to make under its powers, as shown by its articles of incorporation.

4. That the persons who control the corporation were individually acquainted with the material provisions of the contract, and

5. That after the corporation came into existence that it did perform certain corporate acts that recognized the existence of the contract.

We will try to discuss these matters in their order:

Circumstance No. 1: It is hard to conceive of any case coming up under the title of this thesis where much attention must be given to this requirement. It needs no extended discussion. A mere statement of it as a circumstance required to be pleaded is probably sufficient. The parties referred to include the promoter or the promoters on one side and the other contracting parties on the other side.

Circumstance No. 2: It is not required that the contract show that it was made to be with the company in the exact name under which it was actually organized, if in fact it was the same corporation that was contemplated. This qualification of the rule is established in Colorado in a case decided in 1894 by the Colorado Court of Appeals. It is the case of the *Colorado Land & Water Company vs. Adams,* reported in 5 C. A. 190. The facts in this case as stated in the opinion were, in a general way, as follows: One Henry was soliciting subscriptions for water rights in a corporation that he was then contemplating organizing. The memorandum of the contract with the plaintiff was a note made January 28, 1890. A few days later the corporation was organized. Henry was the president of the company and as such negotiated further with the plaintiff in regard to the contract. The name of the contemplated corporation, as stated in the memorandum was "The Colorado Land & Canal Company". The corporation as organized was "The Colorado Land & Water Company". The court held that the difference in the name of the company as organized was immaterial, that the Corporation that was organized was the one contemplated by the parties. It was

a case of specific performance, and relief was granted to plaintiff.

Circumstance No. 3: This is a matter that does not require extended discussion. The forms of articles of incorporation as now in use are all so general in their powers that it is only the exceptional case when the question would arise as to the lack of the authority of the company. However, it is undoubtedly an essential averment to be made in the complaint on any case of this character.

Circumstance No. 4: This is one of the circumstances which is more frequently discussed in such cases. The general rule is well established that the directors and officers of a corporation are chargeable as said officers or directors with the knowledge of facts that they each had individually as promoters of the company. It is clear, that those who control the corporation after it has been formed bring the knowledge to the corporation that they had as promoters. The knowledge of the minority members of the board of directors or that of some of the officers charged with the business, is not sufficient to charge the corporation with knowledge. The assumption of knowledge on the part of the corporation can only be sustained where the controlling force of the corporation has that knowledge. In those cases where the controlling power of the corporation is vested in persons who were not previously promoters of the company, an entirely different situation exists, then actual knowledge of the individuals who are in control of the affairs of the company, of all the material provisions of the contract must be shown before the corporation can be considered a party to the contract.

There are some qualifications of the general rule that the knowledge had by a promoter is imputed to the company by reason of the fact that he later becomes a member of the board of directors or an officer of the company. A corporation is not charged with notice of facts known to the promoter in a transaction between him and a corporation in which he is acting for himself and not for the corporation. The general rule, that the knowledge of the agent is imputed to the principal, rests upon the presumption that the agent will disclose what it is his principal's business to know and the agent's duty to impart. Where the facts are such that by reason of the

selfish interests of the promoter or for any other reason there is an antagonism between the company and the promoter, then the reason for the rule ceases and the rule fails.

Circumstance No. 5: This is the one circumstance that is referred to in the greater majority of opinions on these cases. The circumstance is that after the corporation comes into existence that it did perform certain corporate acts that recognized the existence of the contract.

The general rule under this circumstance is as follows: it is not essential to bind the corporation that a formal action be taken by the officers and directors in approving the contract, to ratify it. Any conduct by those in charge of the company's affairs, or acts, deeds or correspondence that show the company is interested in the contract and dealing therein is sufficient to make the contract that of the company.

There is a Colorado case which has followed this general rule in substance. It is the case of *Possell vs. Smith,* reported in 39 Colo. 129. This was a case where corporate liability was claimed on a contract with the promoters of a company for the purchase of an air compressor. It does not appear in the opinion as to whether delivery of the compressor was made before or after the organization of the company nor does it appear whether any of the promoters constituted the officers or the directors of the company. The rule announced was that, when the corporation used the compressor and the directors individually had knowledge of all the material facts regarding the contract, that the company was liable. It was also held specifically that it was not necessary for the board of directors in a body, or at a meeting assembled, to formally adopt and ratify the contract in order to establish the liability of the company. The facts showed that the company used the compressor; that a majority of the directors of the company knew all the material facts involved in the contract; and the knowledge that they had, as individuals, of such facts, established the liability of the corporation.

There is another Colorado case which will undoubtedly be of keen interest because it establishes the right of an attorney to fees charged for drafting the articles of incorporation of a corporation, and supervising the filing thereof. The facts shown were that plaintiff had served as the attorney for

the company for several years after it was organized. The real point in issue before the Supreme Court was as to the attorney's right to compensation for his services to the promoters. The court approved the rule that where the promoters and directors were the same persons after the corporation came into existence, that was in fact a ratification of the promoters' contract of employment, and that no formal acts by the board of directors or the officers of the company were necessary to establish the company's liability on the contract. The case referred to is *Expansion Company vs. Campbell,* 62 Colo. 410.

There is a line of cases wherein the courts have required that a showing be made of actual corporate action of ratification, before the corporation can be considered to be a party to the contract. This rule is laid down in Illinois, and was stated in the case of *Erd, et al., vs. Rapid Transit Corporation,* and reported in 206 Ill. App. 350. The opinion was handed down in April, 1917. The matter involved attorney's fees for services rendered in perfecting the organization of the corporation, including the by-laws of the organization meeting, the stockholders' meeting and that of the board of directors. The evidence tended to show that the officers of the company and the board of directors accepted the benefits of the plaintiff's services. It appeared that the contract for the plaintiff's services was made with the promoters of the company and that the same persons were thereafter the directors of the company, and also that the company had received the full benefit of plaintiff's services. The court took the position that as there was no express corporate action specifically assuming the contract by the corporation that the corporation was not a party to it. This is an extreme case and an exception to the general rule established in other jurisdictions. It is the most extreme case of this character that we have been able to find. The court in deciding the case for the defendant corporation, quoted with approval from 10 Cyc, 265, the following language:

> "It is difficult to understand how the corporation is to be estopped by accepting benefits it had no power to reject without uncreating itself."

The courts have done quite a bit of unnecessary theorizing in order to state a good explanation of how a corporation can

become a party to a contract which was made before the corporation came into existence. The frequency with which this problem came up to the judiciary, and the equities that were apparent in many of the cases, required that the rights of persons who dealt with promoters in good faith should be protected regardless of the theories upon which the protection was to be given.

Of the theories advanced to sustain the liability of a corporation upon contract of its promoters, the one stated in the majority of the cases is that of ratification. This theory has been the subject of very strong attacks both by the text writers and the courts, and cannot be said to be an entirely satisfactory ground, however, it is the Colorado rule without any criticisms or suggestions.

Another term that has met with more favor in describing what takes place when a corporation becomes liable upon the contract made by a promoter is "Adoption". There is little less objection to this term than there is to ratification, if the contract has actually been effectuated between the promoter and the one seeking to enforce it, the strict principle of contract, not to permit a third person to make himself a party by mere adoption without any consideration flowing to or from him, must be disregarded. The corporation can make itself responsible for the acts and representations of a promoter by adoption. Adoption may be implied from the acts or acquiescence of the corporation without any express acceptance. The corporation has knowingly received the benefit from the arrangement or understanding entered into by the promoters, it will not be permitted to deny that it agreed to it. There are numerous authorities in South Dakota, Texas, New York, Minnesota, and in our own state in this regard.

There are two other grounds that have been suggested by some Courts as the theory upon which the liability of a corporation upon a contract made with its promoters has been sustained; the first of these is novation, that is that the corporation's liability is substituted for the liability of the promoter. The other is that the proposition made by the promoter was a continuing offer to be accepted or rejected by the corporation when it came into being, and upon its acceptance, becomes an original contract on its part. The theory of these

last two grounds is material in affecting the personal liability of the promoters. Neither of these grounds have been used in Colorado.

Much of the difficulty of this subject has resulted from the fact that the first two grounds were the ones originally advanced, and that they were not strictly satisfactory, because it was difficult, on scientific principles to see how a contract made before a corporation came into being could be ratified or adopted by it. On the other hand there was the injustice and absurdity in denying liability of the corporation merely because of the technicality that its incorporation so changed the character of the operating forces which created the contract that it was not liable thereon, when the directing minds continued to be the same after as before incorporation, and all parties participating in the transaction intended and understood that the contract was to be that of the corporation.

The rule as to personal liability of a promoter for a contract made by him as such is governed by the general rules of contracts. Presumably the contract is his. If he made it with the general understanding that the contract was limited to the corporation to be formed then he probably will escape personal liability in regard to it. Only where the agreement is specifically of that character will he escape personal liability.

Conceivably, there are circumstances where neither the promoter or the corporation are liable on the contract sought to be established. It is clear, however, that where the promoters of a company make a contract in the name of a proposed company, and thereafter fail to perfect the organization of the company, then they are personally liable on the contract.

Every corporation formed must have its promoter. It need not have a father and a mother, but it must have one of them. Some person or persons must do the work required to prepare the proper papers and obtain the articles of incorporation. In practically every case an attorney is employed to perfect the incorporation. Other expenses must be incurred before the corporation comes into existence. Fortunately in nearly all of such cases there is no dispute about the discharge of these expenses. It is only one case in a hundred where a controversy comes up as to the payment of the expenses of incorporation. In each of these hundredth cases the same tech-

nical question exists that the company before it is formed can make no contracts, can incur no liabilities on a contract in its name, and can claim no benefits by reason of such contract.

This discussion has been devoted almost in its entirety to the questions as to the liabilities incurred under such contracts, rather than the benefits obtained thereby. The reason for discussing the matter in such a way is that practically all of the cases reported dealt with liabilities instead of benefits. The contract in question, like all other contracts, works both ways. The same rules apply whether the establishing of the contract will result in the imposition of liability or the bestowal of a benefit.

RALPH FLEAGLE SHOULD HANG

By D. B. Kinkaid of the Denver and Lamar Bar Associations

AN article, by Mr. Philip Van Cise, appeared in the November issue of Dicta, under the heading, "Should Ralph Fleagle Hang?" We will reply to the question propounded by Mr. Van Cise, under the heading, "Ralph Fleagle Should Hang".

Mr. Van Cise advises executive clemency, i.e. that the Governor of Colorado should disregard and set aside the findings of the jury, in the Fleagle case, and fix "life imprisonment" as the penalty; that the Governor should disregard the law now extant in regard to determining the degree of punishment which should be allotted to the accused. With this position taken by Mr. Van Cise we cannot agree.

What the Governor will do, under the circumstances, we do not know, but we have hope that he will enforce the law as it now stands without fear or favor.

Ralph Fleagle has, and had, from the inception of the cause, an able, learned attorney. Judge Cunningham knew, and naturally so informed Ralph Fleagle, that an oral promise that he would receive "life imprisonment only" was absolutely valueless; that there was no power under our statute to enforce the same.

Did Ralph Fleagle confess because of the alleged oral promise of clemency? Did he do so purely and alone because he had received the alleged oral promise that he would only be given a sentence of life imprisonment?

Mr. Harper, the detective employed by the Bankers' Association, testified at the trial of Fleagle that he secured the confession from Fleagle when he showed him a telegram which he had prepared to send to a Criminologist in California, employing him in the case; that Ralph Fleagle knew the Criminologist and feared him and then, and then only, agreed to confess, provided the Criminologist was not employed.

That fact has been practically lost sight of and been overshadowed by the glamour of a more appealing matter, towit,

an alleged promise. It cannot be justly claimed that the only cause which moved Fleagle to make the confession was the "promise", the terms of which are in dispute. There was in addition to the above, a promise which has been kept, to the effect that his brothers and father would not be prosecuted. There were perhaps other moving causes which caused him to make the confession, of which we do not know and never will know, for the reason that they are hidden in the breasts of Ralph Fleagle and his family. It does not appeal to us to be logical to assume, or presume, that Ralph Fleagle made the confession purely for the reason that an alleged promise, that he would receive a sentence of life imprisonment only, was made.

It has been, and is claimed, that the confession of Ralph Fleagle saved the lives of four innocent men. That is questionable. We feel safe in asserting that no jury in Prowers County or in any other county in the state would have convicted Whitey Walker et al. after the finger print of Jake Fleagle, connecting the Fleagles with the case, had been discovered. We do not believe that our District Attorney would have attempted to convict Walker et al. after the finger print of Jake Fleagle had been found.

The testimony, in regard to the so called agreement as to life imprisonment or hanging, was decidedly conflicting. Mr. Harper, testifying for the defense, alleged that a positive assurance was given Fleagle that he would only receive life imprisonment. Two or three others also testified to like effect, yet testimony was also given by equally credible witnesses to the effect that the agreement was only that the prosecutor would not *"ask"* for the death penalty. All this evidence was placed before the jury and it found against Fleagle. Should their finding be disturbed?

Mr. Van Cise claims that the prosecuting officers and police officials of our state must "dicker and deal" with criminals; that otherwise we will not secure convictions. That is a matter for our legislative bodies. The Fleagle case should be conducted in accordance with the law *now extant* and not in accordance with what some one or more individuals think the law should be. The same claim made by Mr. Van Cise was made by Mr. Harper in his testimony before the Fleagle

jury, although it was purely argumentative, yet the jury found that Fleagle should hang.

Mr. Van Cise alludes to the fact that no identification or attempted identification was made by the prosecution in the trial of Ralph Fleagle. No identification was necessary under the plea of guilty entered by Fleagle. What identification might or might not have been made of Ralph Fleagle is beside the point in question.

Mr. Van Cise further claims that the evidence against Ralph Fleagle prior to the confession was purely circumstantial. That may or may not be true, but, is it not just as reasonable to assume that Ralph Fleagle believed that there would be more than circumstantial evidence adduced? Ralph Fleagle knew what could have been discovered against him, in connection with the murder and robbery, and the confession was made by him with a clear understanding of the consequences. He and his attorney knew that the promise, if such promise were made, of a life imprisonment sentence only, meant nothing. They knew that the degree of punishment must be left to a jury, not then selected. Great care was taken by counsel for the defense in the selection of the jury.

Mr. Van Cise further states as follows, to-wit:

"Under the Statutes (C.L. 6665) the jury alone and no one else can fix the penalty for first degree murder! No outside agency of any kind can interfere with this exclusive prerogative."

This appears to us to dispose of the whole matter. Ralph Fleagle must hang, in accordance with the verdict of the jury, or our statutes must be disregarded. No "outside agency" should interfere.

The only way in which Ralph Fleagle can escape the penalty of death, imposed by the jury, is to have or secure some "outside agency" to circumvent the statutes in regard to this matter.

It is true some states have statutes authorizing contracts between the State and the defendant, but Colorado has no such statute.

Mr. Van Cise further says:

"Oral agreement between the State and the defendant, *without the approval of the Court.*

"Such an arrangement is of no value whatever in Colorado, affords no protection to the defendant, and cannot be offered in evidence. It also is dangerous, as it opens the door of misunderstanding."

As the alleged agreement made with Ralph Fleagle was made without the "approval of the Court", it appeals to us that the above statement made by Mr. Van Cise is controlling; that there should be no further quibbling or reference made to the alleged agreement and that the decision of the jury should be strictly adhered to and carried out.

We agree with Mr. Van Cise in his statement that evidence as to the so called agreement could not legally have been forced into the testimony, but the prosecuting officers in their desire to deal absolutely fairly in every respect with the defendant, Fleagle, permitted the evidence thereof to go to the jury and the evidence in regard to the agreement was full and complete.

Mr. Van Cise quotes a decision from our Supreme Court as follows, to-wit:

"We are not aware that the District Attorney has the power to suspend the operation of a statute or to make a valid agreement by which he is to refrain from enforcing the criminal laws of the State * * * proof of such an agreement, if made, was improper."

Under that decision of our Supreme Court, why should the alleged agreement made by the District Attorney be given any consideration whatsoever?

Our deductions from the facts and premises laid are as follows:

First: Ralph Fleagle was convicted by a jury of twelve men (one peremptory challenge remaining to the defense) of the murder of the President of the First National Bank and his son, the Cashier thereof, and robbery of said bank.

Second: No judicial or executive clemency should be allotted Ralph Fleagle.

Third: Ralph Fleagle should be hanged as ordered by the jury.

Fourth: That which cannot be done *directly* under the statute should not be done by *indirection, circumlocution* or *circumvention* thereof.

FURTHER COMMENTS *re* FLEAGLE'S CASE*

Editors of Dicta,
Denver, Colorado.

Gentlemen:

Since writing the article "Should Ralph Fleagle Hang" in the November Dicta, I have received a letter from Judge Cunningham, counsel for Fleagle, extracts of which should be of interest to the legal fraternity in connection with the case.

"* * * at the time the agreement was entered into, the district attorney was present and participated actively in the same. * * * he stated that he had consulted with both of the judges of his district (not knowing which of the two might try the case) and that both judges had urged him to enter into the agreement.

That there may be no doubt that Mr. Erickson made this statement, I desire to quote from the testimony given by Chief Harper while on the stand as a witness called by the defendant, which testimony was not denied nor was there any attempt made to deny it.

The following questions were propounded to Chief Harper and he made the following answers thereto:

'Q. Now state just what transpired, beginning with the opening of the meeting?

A. As I recall, you (meaning the writer) wasn't present in the room at our first conference. I informed the gentlemen present of our negotiations so far as we had gone; and informed them that I believed we was in a fair way to get a complete confession from Ralph Fleagle, clearing up this whole affair.

Q. At that point, before going further, may I interrupt you with a question: Had you at that time, in your judgment, sufficient evidence to have convicted Ralph Fleagle of this bank robbery?

A. We did not.

Q. What was your belief as to his connection with it at that time?

A. At that time we weren't certain that Ralph Fleagle participated in this bank robbery but we believed that he knew all about it.

Q. And when you say, "we", who do you include in that?

A. Sheriff Aldermann (of Prowers County), Mr. Erickson (the district attorney), Mr. Hemming (the banker), and the others.

Q. All right. Now, having stated that you didn't have the evidence.

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* *Editor's Note*: These comments were received by letter from Mr. Van Cise after his November article had gone to press. The letter is printed in full and, together with Mr. Kinkaid's article in this issue, throws a further sidelight upon a vexed question.

A. That part may be, I can only answer for myself, but I believed at that time that Ralph Fleagle, if he didn't actually participate in the bank robbery, knew all of the facts.

Q. Well, you and Mr. Alderman were certainly in accord upon that?

A. Yes, sir.

Q. And Mr. Erickson, or could you speak for him?

A. Up to that time I hadn't gone into details closely with Mr. Erickson regarding Fleagle, except over the telephone; I had several conversations over the telephone with Mr. Erickson.

Q. There had been no action filed against Mr. Fleagle at that time, had there?

A. I believe there had in the justice court here.

Q. All right. Proceed now with your conference.

A. Two or three days before this conference, I don't recall the exact time, Mr. Erickson and I had called each other on numerous occasions and had talked regarding the securing of a confession from Ralph Fleagle. Mr. Erickson informed me that he didn't like the idea of having to deal with one of these men, but it looked to him as though it was our only way out. But consistently refused to make such a deal until he had consulted with both district judges of this district, Judge Hollenbeck and Judge McChesney, as I recall his name. He informed me that before he would come to Colorado Springs on any such a mission he must consult with them, and get their ideas. At the meeting in Colorado Springs, Mr. Erickson there informed me of his conversation with the two district judges, and the outcome of it.

Q. What did he say, what outcome did he relate to you?

A. *Mr. Erickson informed me that both district judges urged him to make a deal with Ralph Fleagle, in order to clear this case up completely.*

Q. What did he say his attitude of mind was at that time?

A. He believed it was necessary to do so.'

* * * upon the day the agreement was entered into, the district attorney stated that on several occasions, to his personal knowledge, defendants charged with murder in Las Animas County who had made confessions were given a life sentence on pleading guilty to second degree murder and *that the judge presiding had instructed the juries to return such verdict.* The district attorney called attention to one case tried in that county in which, notwithstanding such instruction the jury had returned its verdict wherein the penalty was fixed at death, but that in the case just mentioned the proceeding was declared a mistrial and a new jury was empaneled, the case tried, the jury instructed, and a life sentence returned.

I am also inclosing an instruction which the court actually gave.

'Gentlemen of the Jury, it has developed in this case, as you probably have observed, that there is some difference of opinion between the District Attorney and one of the attorneys for the defendant, touching the terms and conditions of the agreement mentioned in the evidence. Such differences after a considerable lapse of time, are not unusual, and they do not indicate to the

court's mind bad faith upon the part of anyone connected with said agreement. As the court views the entire circumstances surrounding the agreement aforesaid, this difference of opinion seems to be more apparent than real. The defendant and his attorney, I think it may be fairly assumed from the evidence, believe the promise to be that the former would not receive the death penalty, and, so believing the defendant made his confession which fully cleared up the mystery surrounding the tragedy in which he took part, and has brought to the bar of this court three of the four parties guilty of it, and disclosed the identity of the fourth party. You are further instructed that evidence of such compact and confession, and matters incident thereto, are circumstances to be taken into consideration by you in determining what punishment should be fixed by you and your verdict if you find the defendant guilty of murder in the first degree.' "

Res ipsa loquitur!

In this connection it is interesting to observe the recent conduct of the district attorney and district judge at Craig, Colorado, when Raymond Gray was convicted of first degree murder with life imprisonment as the punishment. Gray confessed, according to the district attorney, with the understanding that the penalty would "go light".

Judge Charles E. Herrick instructed the jury,

"* * * if you believe that he confessed, acting under the impression that he had been promised he would not receive the supreme penalty, then I say our word should be as good as our bond. We should keep faith."

The district attorney, the district judge and the jury are to be congratulated on their enforcement of the law in Craig.

Yours very truly,

PHILIP S. VAN CISE

RECENT TRIAL COURT DECISIONS

(EDITOR'S NOTE.—It is intended in each issue of Dicta to note interesting decisions of the United States District Court, the Denver District Court, the County Court, and occasionally the Juvenile Court.)

DENVER DISTRICT COURT—No. 103249—Div. 4—*L. V. Baugher, et al, vs. City and County of Denver, et al.—Hon. Henry Bray, Judge—Decided November 23, 1929.*

Facts.—One of defendants was a police officer of the City and County of Denver. On the day of the accident he had been ordered by his superior to go to his home, put on his uniform and report to the City Hall for duty. While driving to the City Hall in an automobile owned by the City, he collided with a car in which the plaintiff was riding. As a result, plaintiff was seriously injured. Plaintiff sues the police officer and the City and County of Denver for damages on the ground of negligence. Jury returned a verdict for plaintiff on the ground of negligence.

Held.—1. Judgment entered against the police officer.

2. Directed verdict in favor of the City and County of Denver.

The City and County of Denver is engaged in two kinds of activities—governmental and ministerial. The police officer in this instance was acting as an administrative officer for the city in its governmental capacity. The city is not liable for the torts of its agent while acting in a governmental capacity.

DENVER DISTRICT COURT—No. 107127—Div. 2—*Young Women's Christian Association of Denver vs. Clem W. Collins—Hon. J. C. Starkweather, Judge—Decided November, 1929.*

Facts.—Plaintiff, a charitable organization, is the owner of certain lots and building thereon in the City and County of Denver. A portion of this building is used and occupied as a cafeteria. The cafeteria is operated solely by the plaintiff association. Meals are served at a profit to the general public. However, the gross receipts of the cafeteria are turned over to the general fund of the association from which fund all disbursements are made, including the expenses of operation of

the cafeteria. Any profits derived from the operation are used for charitable purposes. A large portion of the general fund of the association is obtained annually by popular subscription. Plaintiff association in order to carry out its charitable work maintained a number of clubs for business and industrial girls. These clubs met weekly or oftener, the meetings being held at dinner time and meals served to the girls attending at less than cost.

Article 10 Section 5 of the Constitution of Colorado provides "lots with the buildings thereon, if said buildings are used solely and exclusively for religious worship, for schools or strictly charitable purposes, shall be exempt from taxation unless otherwise provided by general law."

Compiled laws 1921 Section 7198, Section 2, provides "the following classes of property shall be exempt from general taxation, to-wit:—*Fourth*—Lots with the buildings thereon, if said buildings are used for strictly charitable purposes."

Defendant allowed an exemption for all but 13.7% of building and lots for the year 1928 which he segregated, this being the proportionate part of the building occupied by the cafeteria and assessed taxes on said building and lots for said segregated portion of 13.7%.

Plaintiff in this action prays for an injunction to prevent the advertising and selling of this property for said taxes.

Held.—The cafeteria falls within the exemptions from taxation as provided in Article 10 Section 5 of the Constitution and Section 7198 of the Compiled Laws of 1921.

The Supreme Court of Colorado has always given a very liberal construction of the above provisions. The evidence shows that whatever net profit, if any, derived from the operation of this cafeteria would be disbursed for charitable purposes along with other funds of the association. The evidence further shows that thru the system of clubs used to promote the general purpose of the association, meals were furnished by the cafeteria below cost to many girls who could not otherwise have purchased meals or participated in the activities of the association. Therefore, the cafeteria was used for charitable purposes.

Injunction Made Permanent.

COLORADO SUPREME COURT DECISIONS

(EDITOR'S NOTE.—It is intended in each issue of DICTA to print brief abstracts of the decisions of the Supreme Court. These abstracts will be printed only after the time within which a petition for rehearing may be filed has elapsed without such action being taken, or in the event that a petition for rehearing has been filed the abstract will be printed only after the petition has been disposed of.)

APPEAL AND ERROR—SUFFICIENCY OF EVIDENCE—NO. 12471 —*Cherokee Realty Company vs. Allen—Decided December 9, 1929.*

Facts.—Allen had judgment against defendant for services rendered in effectuating the exchange of real estate belonging to plaintiff below. The plaintiff alleged that the compensation was to be paid in cash while the defendant alleged another method of payment.

Held.—The evidence upon the only question in dispute was in sharp conflict; there was competent evidence before the Court upon which to base his judgment, and under the well established and oft announced decisions of this Court, we are not at liberty to disturb it.

Judgment Affirmed.

ATTORNEYS — DISBARMENT — *People vs. Lindsey* — No. 12130—*Decided December 9, 1929.*

Facts.—Lindsey, while Juvenile Judge and also while still holding a license as attorney at law, accepted $37,500 from Mrs. Stokes and $10,000 from Samuel Untermyer, New York attorney, as the result of a contest instituted by Mrs. Stokes as guardian of her two minor children to set aside the will of their father in the State of New York. The contest resulted in a settlement whereby certain shares of stock were secured of great value. Proceedings with reference to the guardianship of the persons of these minors were at that time pending in the Juvenile Court, without having been finally closed. With the knowledge of the Juvenile Judge and at his instigation, proceedings were had in the County Court of Denver to have Mrs. Stokes appointed as guardian of the estate of said minors, a petition was filed therein stating that there was not sufficient cash in the estate and it was necessary to borrow money on the stock belonging to the minors in order

to pay certain local parties for services. An order was entered granting such permission. The certain local parties was the respondent, Lindsey. The respondent claimed first that the $37,500 and the $10,000 were a gift and were not for services as an attorney; and second that the contest over the Will, being in the State of New York, had no reference to any legal services or litigation in the State of Colorado over which this Court would have jurisdiction.

Held.—Lindsey rendered legal services and not mere services of a friend, mediator, or arbitrator. The money was paid to him for legal services and not as a gift. An essential element of a gift is an intention of the donor to bestow something on the donee voluntarily and without any consideration whatever. In the instant case, Lindsey gave a receipt in full for the moneys received by him. Gifts are exempt from the imposition of any income tax under the laws of the United States, yet the respondent, in his income tax, returned the amount received as income received. Respondent was false to his oath taken as a judicial officer, and also false to his oath as an attorney and counselor at law, and has proven himself unworthy of the trust imposed in him by this Court.

Judgment entered that respondent be removed from the office of attorney and counselor at law and his license revoked.

AUTOMOBILES — LAST CLEAR CHANCE — PLEADING — No. 12182—*Bragdon vs. Hexter—Decided November 12, 1929.*

Facts.—Personal injury action by Hexter against Bragdon. The trial Court introduced into the case for the first time by its instructions, the Last Clear Chance doctrine. The same was not pleaded by the plaintiff either in his complaint or replication. In the answer, the defendant alleged that plaintiff was guilty of carelessness and negligence. Plaintiff simply filed general denial.

Held.—When the defendant specifically alleged in the answer that plaintiff was guilty of negligence that directly contributed to the accident, and plaintiff filed replication consisting of a denial, plaintiff may not avail herself of the Last Clear Chance doctrine. If plaintiff desired to avail herself of

this doctrine, she must affirmatively plead facts showing that the last clear chance doctrine was applicable.

Judgment Reversed.

BANKS—CHECKS—DEPOSITS—*Broomfield vs. Cochran*—No. 12304—*Decided December 9, 1929.*

Facts.—Defendants issued a check to Cochran drawn on the International Trust Company. The check was endorsed and deposited in defendant's account at the Broadway National Bank. The drawee was permitted by the bank to draw against the check after its deposit. Payment was stopped on the check and the receiver of the bank brought suit against the makers to cover the amount paid out by the bank. Judgment for defendant in the Court below.

Held.—Where a check is drawn on one bank and unconditionally deposited in another, the latter becomes merely an agent of the depositor and title does not pass to said bank; but if the bank of deposit extends credit and permits the depositor to withdraw the amount of the check, the bank becomes the owner thereof.

Judgment Reversed.

BILLS AND NOTES—BONA FIDE HOLDER—CONSIDERATION—No. 11940—*Schwalb and Cannon vs. Riel—Decided November 12, 1929.*

Facts.—Plaintiffs sued defendant on two counts to recover on two promissory notes. Defendant interposed two defenses alleging no consideration, payment, and estoppel. The Court refused to instruct verdict for plaintiffs.

Held.—The undisputed evidence discloses that a valuable consideration was paid for the notes and that there was no payment by set-off, or otherwise, and that the defendants are not estopped to assert that they are *bona fide* holders for value in good faith, and without notice of any infirmity in said notes. The lower Court should have directed a verdict for the plaintiffs.

Judgment Reversed.

BROKERS' LICENSE—CONTRACTS—No. 12420—*Black Forest Realty & Investment Co. vs. Clarke—Decided November 25, 1929.*

Facts.—The Realty Company employed Clarke as its general sales manager to have supervision of all sales of lots owned by the Company. Clarke was to receive a salary, plus five per cent. of the purchase price on sales. He recovered judgment below; defense was that he had no real estate brokers' license. This issue was not tendered until day of trial and Court denied application to amend.

Held.—It was not necessary for Clarke to have a brokers' license. He was merely an employe of the Company. The proposed amendment presented no defense, but if it were otherwise, the delay in applying for leave to amend would justify the Court in denying the application.

Judgment Affirmed.

CONTRACTS—TIME NOT ESSENCE OF CONTRACT—*Kitt vs. Runge*—No. 12187—*Decided December 9, 1929.*

Facts.—Parties below entered into a contract to exchange certain lands, exchange to be made on October 1st, 1927. Exchange could not be completed on the date specified because there was a mortgage against one of the pieces of land, and the holder of the mortgage delayed in executing the release through no fault of the owner of the land. Time was not specifically mentioned as being of the essence of the contract. Court below granted specific performance.

Held.—Time is not of the essence of a contract, unless it is made so, either specifically or by the circumstances of the case.

Judgment Affirmed.

CRIMINAL LAW—CONFIDENCE GAME—BILL OF PARTICULARS —12343—*Stewart vs. People—Decided Dec. 2, 1929.*

Facts.—Stewart was convicted of an attempt to obtain money from an insurance company by means of the confidence game. He filed claim against an insurance company for theft of two wheels, tires and tubes. Upon investigation the alleged stolen property was found hidden on his premises. Stewart

introduced no evidence in defense. He asked for a bill of particulars.

Held.—It is within sound discretion of the lower court to grant or deny motion for bill of particulars in a criminal case. The evidence justified conviction.

Judgment Affirmed.

DEEDS—RESERVATION OF MINERALS—SURFACE RIGHTS—No. 12203—*Whiles vs. The Grand Junction Mining and Fuel Company—Decided November 12, 1929.*

Facts.—Plaintiff Whiles is owner of irrigated lands by virtue of divers mesne conveyances from the Union Pacific Railroad Company. The Railroad Company reserved minerals and coal underlying the surface. Defendant is lessee of the Railroad Company of the coal underlying Plaintiff's land. Action was for injunction to restrain defendant from entering upon or mining coal.

Held.—Impossible to mine coal in such a way as to leave sufficient support for the surface. Defendant may not remove coal unless it furnishes a statutory indemnity bond to protect the plaintiff in surface rights. Defendant restrained until such bond is furnished although surface owner is not obliged to ask for a bond, nevertheless, if bond is offered sufficient to protect the surface owner, the Court may permit further mining operations by requiring a bond that will cover all damages that the surface owner may suffer.

Judgment Affirmed.

DIVORCE—ENTRY OF FINAL DECREE—No. 12164—*Sarah A. Tierney vs. M. E. Tierney—Decided October 14, 1929.*

Facts.—Plaintiff below (plaintiff in error) brought an action for divorce and findings of fact and conclusions of law in her favor were entered. About four months thereafter she filed a petition asking that the suit be dismissed. Defendant resisted this petition and thereafter the Court entered a decree of divorce in favor of plaintiff, but over her protest.

Held—This case is governed by *Walton v. Walton,* 278

Pac. 780, which held that a guilty party may not obtain a decree of divorce over the objection of the successful party.

Reversed and Remanded with Instructions.

INJUNCTION — SPECIFIC PERFORMANCE—REPLEVIN—LEGAL AND EQUITABLE RELIEF—No. 12204—*Mosco vs. Jeannot—Decided November 25, 1929.*

Facts.—Mosco, through her next friend, brought action against defendants asking for an injunction, and at the same time asking for damages and for a body judgment, on the grounds that defendants were conducting a voting contest whereby the one receiving the largest number of votes was to win an automobile and the plaintiff alleged that she had the largest number of votes, but that defendants awarded the automobile to one, Martinez, one of the defendants, contrary to the rules of the contest. Demurrer to the complaint was sustained below.

Held.—Plaintiff below mistook her remedy. She should have brought an action in the nature of replevin to recover her automobile, and if she was entitled to it, it would have been awarded to her by the Court. The facts pleaded present no case for injunctive relief, nor for specific performance of contract.

Judgment Affirmed.

INTOXICATING LIQUORS—SUFFICIENCY OF EVIDENCE—No. 12453—*Wilkins vs. The People—Decided October 28, 1929.*

Facts.—The Defendant below was convicted of a second offence in violation of the intoxicating liquor statute. The sole question on which defendant relies for reversal of the judgment is the insufficiency of the evidence.

Held.—There was sufficient evidence to sustain the verdict. The credibility of witnesses and the weight to be given to the testimony was exclusively for the jury, and the jury found the defendant "guilty".

Judgment Affirmed.

LIBEL—PRIVILEGED COMMUNICATION—MALICE—*Walker vs. Hunter*—No. 12272—*Decided December 9, 1929.*

Facts.—Walker sued Hunter and others for libel on account of matters contained in a petition to the County Commissioners to close a certain dance hall. In the complaint the plaintiff alleged that the defendants falsely, maliciously, and with intent to injure and prejudice the plaintiff, published the libel, and that the same was false and was known by the defendants to be false, and that the defendants were guilty of malice and wilful deceit in the matter. Court below sustained a demurrer to the complaint.

Held.—The complaint sufficiently charged express malice. The demurrer should have been overruled.

Judgment Reversed.

PHYSICIANS—OSTEOPATHY—No. 12237—*Newton vs. Board of County Commissioners—Decided November 25, 1929.*

Facts.—Newton has state license to practice medicine as an Osteopathic Physician, and seeks to enjoin the enforcement by the Board of a practice barring Osteopathic physicians from practising in two county hospitals maintained by the Board. The District Court sustained a general demurrer.

Held.—A physician has no constitutional or statutory right to practice his profession in a county hospital. The county board has complete supervision and control. A regulation excluding from the county hospital, or the right to practice therein, the devotees of some of the numerous systems or methods of treating diseases authorized to practice the profession in Colorado, is neither unreasonable or arbitrary.

Judgment Affirmed.

PLEADING—ABUSE OF—NEXT FRIEND—NO. 12,281—*Ellis v. Colorado National Bank—Decided October 28, 1929.*

Facts.—Plaintiff, who was apparently insane, but has never been judicially declared to be such was given permission by the Court below to bring suit by next friend on the ground that defendants were depriving him of his property by taking advantage of his mental disorder. Ellis' motions

were filed in the Court below, and the plaintiff standing on the complaint, the same was taken to the Supreme Court, which sustained the complaint and remanded the cause with directions to overrule the motions and proceed in harmony with the opinion. Instead of promptly proceeding with the discussion of the pleadings and getting the case to issue, various motions and demurrers were filed by the defendant. The Court below sustained a demurrer on the ground that the plaintiff could not sue by next friend, but only in person or by a conservator.

Held.—Plaintiff not having been judicially declared insane should have been permitted by the Court below in its discretion to sue by next friend. The repeated reversal of its rulings by the trial Court after long delays, amounted to such an abuse of discretion as to defeat the very purpose of that discretion. All motions and demurrers, if practicable, should be filed at the same time, and the trial should not be turned into a tournament of pleading, rather than a trial of substance.

Judgment Reversed.

RAPE—MENTAL INCOMPETENCE—WIFE TESTIFYING—No. 12441—*Wilkinson vs. People—Decided November 4, 1929.*

Facts.—Wilkinson was convicted of the crime of rape. Wilkinson was the step-father of the victim, and his wife, the mother of the victim, and the victim was a dwarf, twenty-four years of age with the mentality of a ten-year old child. Wife of defendant was permitted to testify as to her name, but was not interrogated further.

Held.—1. Wife is competent to testify against her husband where he is charged with rape against his step-daughter, who is the real daughter of the wife. 2. The victim was competent to testify, and whether or not she possessed sufficient mental capacity to give her legal consent was a question of fact for the jury. 3. If defendant relies upon improper conduct, or suggestions by the District Attorney, or others interested in the prosecution they should immediately be called to the at-

tention of the trial court, and if not, it is too late to complain in the Supreme Court.

Judgment Affirmed.

REAL ESTATE BROKER—COMMISSION—No. 12459—*Ness vs. Podd—Decided October 28, 1929.*

Facts.—Podd was a licensed real estate broker, and Ness listed said real estate with him for sale at $2850. The broker obtained a prospective purchaser who was pleased with the property, but wanted to get a reduction in price. Two weeks later, Ness sold the same property through another broker to the same prospective purchaser for a less price.

Held.—The broker was entitled to his commission for the sale. The law will not permit one broker who has been entrusted with the sale of land, and is working with a customer whom he has found, to be deprived of his commission by another agent stepping in and selling to the customer for a price less than the first broker is impowered to receive.

Judgment Affirmed.

SALES—PRINCIPAL AND AGENT—NEGATIVE PREGNANT—No. 12,463—*Everett vs. Cole—Decided November 4, 1929.*

Facts.—Cole claimed he sold Everett seven hundred pounds of buffalo bull meat at fifty cents per pound, for which the latter refused to pay. Defendant claimed he was not a purchaser, but plaintiff's agent to sell on commission, and that through no fault of his, nothing was sold; hence, that he owed nothing. Verdict below for plaintiff for the full amount. *Cole, a member of the bar, accustomed to "throwing the bull", was the owner of a certain buffalo bull, highly educated, having attained the degree of B.S., but notwithstanding this, was wild and fractious which resulted in his summary execution,** and what was left of the bull, after stripping him of his honors, was delivered to Everett who hung him up in his butcher shop, but before any of the meat was sold, it was

*Note: The italics are those of the Editor-in-Chief who admits himself greatly impressed by this rather novel, yet highly commendable, ground for executing an attorney.

condemned by a food inspector who belonged to the "Bull Moose" party.

Held.—The evidence was competent, material, and relevant, and sufficient to support the verdict for plaintiff. The instructions fairly state the law. There was no objection taken to the instructions, but because defendant's counsel had made objections at a former trial and also at his motion for a new trial, recited the objections, he claimed that he could assert the objections here. Rules of the Supreme Court require that specific objections be made to proposed instructions before such instructions are given to the jury. No waiver of a failure to comply with that rule can be binding in the Supreme Court. Furthermore, the answer was a perfect negative pregnant throughout; hence, the allegations of the complaint stand admitted.

Judgment Affirmed.

WORKMEN'S COMPENSATION—DISABILITY—STATUTORY CONSTRUCTION—NO. 12,347—*New York Indemnity Company vs. Industrial Commission and Carl Robinson—Decided October 14, 1929.*

Facts.—Robinson sustained an injury arising out of and in the course of his employment, which caused the loss of his right arm near the elbow and a ninety per cent loss of the left arm. The Commission awarded him compensation for total and permanent disability. Thereafter Robinson himself obtained employment and the Indemnity Company brought suit to reduce the award under Sec. 4451 C. L. 1921, which defines total disability as the loss of both hands, etc., except where *the employer* or *the Commission* obtains suitable employment for the disabled person.

Held.—Robinson having obtained his own employment, this case does not come within the statutory exception, and his compensation is continued.

Judgment Affirmed.

WORKMEN'S COMPENSATION—NONRESIDENT EMPLOYEE—No. 12428—*Platt vs. Reynolds—Decided October 28, 1929.*

Facts.—Platt was engaged in the automobile business in

Denver, and carried Liability Insurance under the Colorado Workmen's Compensation Act. Reynolds was an employee of Platt, but resided in Nebraska, and carried on his entire business in Nebraska. He was killed in Nebraska.

Held.—The Colorado Compensation Act does not apply to one employed by a Colorado Company where the employee contracts to work in another state and is actually injured in another state. The Commission could exercise no jurisdiction over that employment or its conditions. Its protection could not reach that employee there nor could our Courts adjudicate his controversies.

Judgment Reversed.